

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	A.Q. Docket No. 09-0131
Nikole Catherine Terebayza a.k.a.)	
Nicole C. Burke d/b/a)	
Burke's Horses,)	
)	Decision and Order
Respondent.)	by Reason of Default

1. The Complaint, filed on June 4, 2009, alleges, among other things, that Nikole Catherine Terebayza, a.k.a. Nicole C. Burke d/b/a Burke's Horses, Respondent, an owner/shipper of horses (9 C.F.R. § 88.1), during 2004 failed to comply with the Commercial Transportation of Equines for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder (9 C.F.R. § 88.1 *et seq.*). The Complainant seeks \$12,000 in civil penalties (9 C.F.R. § 88.6) for Respondent's failures to comply.

Parties and Counsel

2. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). APHIS is represented by Thomas N. Bolick, Esq., Office of the General Counsel (Regulatory Division), United States Department of Agriculture, South Building Room 2319, 1400 Independence Ave. SW, Washington, D.C. 20250.

3. The Respondent, Nikole Catherine Terebayza, a.k.a. Nicole C. Burke d/b/a Burke's Horses (frequently herein "Respondent Burke" or "Respondent") has failed to appear.

Procedural History

4. APHIS' Motion for Adoption of Proposed Default Decision and Order, filed August 31, 2009, is before me. Respondent Burke was served with a copy of that Motion and a copy of the Proposed Default Decision and Order on September 3, 2009, and failed to respond.

5. Regarding service of the Complaint, Respondent Burke was served on July 13, 2009.¹ What she was served with included a copy of the Complaint, a copy of the Hearing Clerk's notice letter dated June 5, 2009, and a copy of the Rules of Practice. *See* 7 C.F.R. §1.130 *et seq.*

6. Respondent Burke's answer was due to be filed within 20 days after service, that is, no later than August 3, 2009, according to section 1.136(a) of the Rules of Practice. 7 C.F.R. § 1.136(a). Respondent Burke never did file an answer to the Complaint, and she is in default, pursuant to section 1.136(c) of the Rules of Practice. 7 C.F.R. § 1.136(c).

7. Respondent Burke was informed in the Complaint and the letter accompanying the Complaint that an answer should be filed with the Hearing Clerk within 20 days after service of the complaint, and that failure to file an answer within 20 days after service of the

¹ The Complaint was mailed to Respondent Burke at W. 8560 770th Avenue 521, River Falls, Wisconsin 54022-4306, her last known address, via certified mail, return receipt requested. The Complaint was returned to the Hearing Clerk marked by the U.S. Postal Service RETURNED TO SENDER - UNCLAIMED. Section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) states that any document that is initially sent to a person by certified mail to make that person a party respondent in a proceeding but is returned marked by the postal service as unclaimed or refused shall be deemed to have been received by said person on the date that it is re-mailed by ordinary mail to the same address. The Hearing Clerk re-mailed the Complaint to Respondent Burke at the same address via regular mail on July 13, 2009. Therefore, Respondent Burke is deemed to have been properly served with the Complaint on July 13, 2009.

complaint constitutes an admission of the allegations in the complaint and waiver of a hearing.

8. Failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material facts alleged in the Complaint, which are admitted by the Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139. [*See also* 7 C.F.R. § 380.1 *et seq.*]

Findings of Fact and Conclusions

9. The Secretary of Agriculture has jurisdiction over Respondent Nikole Catherine Terebayza, a.k.a. Nikole C. Burke d/b/a Burke's Horses, and the subject matter involved herein.

10. Respondent Burke has a mailing address of W. 8560 770th Avenue 521, River Falls, Wisconsin 54022-4306. Respondent Burke has been commercially transporting horses to slaughter for 25 years.

11. Respondent Burke, during 2004 as specified in paragraphs 12 and 13, commercially transported horses to slaughter and was an owner/shipper of horses within the meaning of 9 C.F.R. § 88.1.

12. On or about October 25, 2004, Respondent Burke shipped 12 horses to Cavel International in DeKalb, Illinois (hereinafter, Cavel), for slaughter. A grey mare bearing

USDA back tag # USAB 0181 and a chestnut mare bearing USDA back tag # USAB 0185 started fighting:

(a) in the middle compartment of the conveyance during the commercial transportation but Respondent Burke or her drivers failed to completely segregate the aggressive horses so that no aggressive horse could come into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii), and

(b) during the commercial transportation but Respondent Burke or her drivers failed to segregate the aggressive horses. Respondent Burke thus failed to handle the horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

13. On or about November 16, 2004, Respondent Burke shipped 12 horses to Cavel for slaughter. One of the horses in the shipment, a buckskin gelding with USDA back tag # USBR 2793, was blind in both eyes, yet Respondent Burke shipped it with the other horses. By transporting it in this manner, Respondent Burke failed to handle the blind horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

14. During the shipments detailed in paragraphs 12 and 13, Respondent Burke failed to comply with the Commercial Transportation of Equines for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*). The maximum civil penalty per violation is \$5,000.00, and each equine transported in violation of the

regulations will be considered a separate violation. Civil penalties totaling \$12,000 are warranted and appropriate in accordance with 9 C.F.R. § 88.6 and based on APHIS's unopposed Motion filed August 31, 2009.

Order

15. The Respondent, Nikole Catherine Terebayza, a.k.a. Nicole C. Burke d/b/a Burke's Horses, is assessed civil penalties totaling **\$12,000** (twelve thousand dollars), which she shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States.**" Respondent Burke shall include with her payments any change in mailing address or other contact information.

16. Respondent Burke shall reference **AQ 09-0131** on her certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties shall be sent to, and received by, APHIS, at the following address:

United States Department of Agriculture
APHIS, Accounts Receivable
P.O. Box 3334
Minneapolis, Minnesota 55403

within sixty (60) days from the effective date of this Order. The provisions of this Order shall be effective on the tenth day after this Decision and Order becomes final. *See* paragraph 17 to determine when this Decision and Order becomes final.

Finality

17. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30

days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 23rd day of March 2010

s/ Jill S. Clifton

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Bldg Room 1031
1400 Independence Ave SW
Washington DC 20250-9203
202-720-4443
Fax: 202-720-9776

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

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SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the

appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]